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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 285

JOE QUONG, JOE WING WAH and JOE WING FONG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION.

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THE GOVERNMENT'S STATEMENT OF FACTS.

The Petition for Certiorari questioned the validity of a Treasury Department regulation. The petition contended that the regulation exceeded the authority granted by Congress, and that its language failed sufficiently to state the nature of the subject it sought to prohibit.

In response, the government presents an extensive statement of facts, totally unrelated to the issues raised. The "facts" as stated are largely government counsel's editorial conclusions drawn from a record which, if presented factually, would yield completely different results.

In view of the nature of our Petition, the only significant facts are:

(a) That petitioners were convicted under the regulation which they attack here;

(b) That the record not only fails to supply, but in fact demonstrates the futility of attempting to find a definition of the terms employed in the regulation.

Accordingly, the government's statement of facts may be regarded as beside the point. We cannot but note with distress, however, a repetition in this Court of a type of presentation which has deflected courts below from a consideration of the significant issues. It would be inappropriate here to dissect and correct the government's statement line by laborious line. On the ultimate briefing of the case, we will, of course, supply a proper factual context. We aver that for present purposes, the relevant facts are fully and fairly stated in the Petition.

ARGUMENT.

The government advances two reasons why your Honors should deny certiorari. Neither suggests the absence of a substantial federal question or the lack of an area of broad concern relative to the federal government *vis a vis* those subject to its jurisdiction. Nor does the government contend, nor could it, that any of this Court's opinions are dispositive of the matters presented in the Petition.

I.

The Government Argues That the Power to Investigate Is the Power to Prohibit.

We complain that the Congress authorized the President to prohibit only transactions in property exhibiting a foreign interest, whereas the regulation prohibits transactions regardless of foreign interest (Ptn. 8-16).

The government admits that the Congress authorized the President to prohibit only those ". . . transactions involving, any property in which any foreign country or a national thereof has any interest . . ." (G. Br. 7). But the government urges that the Congress also authorized the President to *obtain information*

> "'. . . as may otherwise be necessary to enforce the provisions of this [subsection]'" (G. Br. 7).

From this the government concludes that the President can do absolutely anything he wishes to do in order to enforce the subsection so long as the subject of his prohibition lies within the scope of his power to investigate (G. Br. 8-10).

The government arrives at this startling and dangerous conclusion on the theory that given a power to prohibit, and given a broader power to investigate, the power to prohibit necessarily extends to the outer limits of the power of investigation.

The government has thereby offered to your Honors a stunning example of the "enforcement techniques" urged as proper by the government. No more eloquent demand could be made for the Court's regulatory intervention in this case, than that contained within the government's stated reasons for opposing such review.

II.

The Government's Position Relative to the Words "Chinese Type Drugs".

The government's second argument is necessarily distinct from its first, because the grounds urged in our Petition are in no sense interdependent.

The government argues that the words "Chinese type drugs" are meaningful to the "Limited class" sought to be affected.

But if the term "Chinese type drugs" be regarded as a specialized term of art familiar to those conversant with the art, surely a witness versed in that art could have been called to the stand to define the term. This was not done.

In fact the very opposite was done. For Chief Enforcer Minskoff testified without contradiction that the words "Chinese type drugs" were not words of art:

> "It is not a word in art, sir. It is just words we use in everyday language. Chinese type means Chinese type" (App. Appx. 31a).

The judge eschewed a "words of art" theory. He told the jury that Chinese type drugs were items which were ". . . so considered by the public." (App. Appx. 100a)

The government now wishes to see the conviction affirmed by arguing that the term has a specialized meaning to people in the import business. In short, the government will argue from whatever position most conveniently contributes to petitioners' imprisonment. This too, we take it, is part of the "enforcement technique" theory of statutory construction.

Chief Enforcer Minskoff testified that the words "Chinese type" were used as an *enforcement technique* (App. Appx. 29a-30a). Thus the "words of art" were never until now pretended by the government to be words of the *importer's* art, but were represented to be words of the *prosecutor's* art, just as the word "bewitched" was exclusively a term of the inquisitors' art, and no part of the specialized lexicon of the defendant astronomer.

The words "Chinese type" were not words of ordinary commercial knowledge. The word "type" was employed in furtherance of an "enforcement technique". It was a prosecutor's word. Accordingly, one could not go to another person ordinarily engaged in commerce in "Chinese-type drugs." There was no such commerce, except in the head of the Enforcer. (See government expert Chu Fong Ng's testimony that whether or not something constituted "Chinese type drugs", depended upon the decision of Chief Enforcer Minskoff. App. Appx. 104a.)

The government contends that *McGowan* v. *Maryland*, 366 U.S. 420, 428-429 controls. In *McGowan*, a Maryland statute prohibited Sunday sales, excepting merchandise customarily sold at bathing beaches. This Court held that affected persons could know what it was lawful to sell, either as a matter of ordinary commercial knowledge or by making a reasonable investigation at the nearby beach (*McGowan*, 366 U.S. at 428).

The government takes the position that *McGowan* relieves the authors of punitive regulations, of all obligation to use understandable terms. *McGowan* means, according to the government, that it is up to the regulated to find out what the regulator meant, regardless how impractical an investigation might be.

The government reasons: If McGowan must inquire at the local beach, it follows that Quong must inquire in China.

Nothing less will suffice. True, Quong inquired in Washington—but to no avail. All he learned there was that "We know of no published or commonly accepted definition of the term 'Chinese-type' drugs." (App. Appx. 103a).

The definition of the term, if it exists, has thus far eluded the enforcers as well as the courts. To say that the term is meaningful to petitioners, is sheer sophistry, based on nothing more than the fact that petitioners have Chinese-sounding names.

The vagueness of the language in the regulation is such that:

a. Department Alpha of a governmental branch reads a regulation, concludes that certain merchandise properly can be admitted, levies and collects customs duties, and permits the introduction of that merchandise into the interior commerce of the United States:

Then—

b. Department Beta of the *same* branch of the government interprets the *same* regulation as justifying the seizure of that very *same* "lawfully imported" merchandise as contraband and further justifies imprisonment of its importers for having "unlawfully" imported similar merchandise, all on the theory that all merchandise *of that type* is absolutely prohibited entry. (App. Appx. 91a, 92a-93a, 104a,, 112a, 123a).

Another branch of the same government advises that it is unaware of any commonly accepted definition. (App. Appx. 103a).

Yet another branch assures this Court that the "... term is not confusing." (Gov't. Br. 8).

CONCLUSION.

For the reasons stated in our Petition and in this Reply, and for the reasons stated in the government's Brief in Opposition, we respectfully urge that certiorari be granted herein.

Respectfully submitted,

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